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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 1143

FRANHAM DISTRIBUTORS, INC.,
Petitioner,

against

NEW YORK WORLD'S FAIR 1939 INCORPORATED and SWIFT AND COMPANY,
Respondents.

BRIEF OF RESPONDENT NEW YORK WORLD'S FAIR 1939 INCORPORATED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT NEW YORK WORLD'S FAIR 1939 INCORPORATED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

Opinions Below.

The Circuit Court of Appeals for the Second Circuit decided the particular issues herein in question unanimously in favor of this respondent, delivering an opinion which is reported in 124 Fed. (2d) 82.

No reported opinion was rendered by the United States District Court for the Southern District of New York.

II.

Jurisdiction.

Neither the petition nor the record raises a single substantial Federal question (Rule 12, par. 1 and Rule 28, par. 5, subds. a and b), and the petition should now be dismissed on the merits.

The sole question presented to this court is whether or not the plaintiff had proved implied or apparent authority, on the part of two employees of and an attorney for the Fair, to waive the requirements of plaintiff's bid that all concession contracts must be in writing, executed by a duly authorized officer of the Fair, and had proved that these two employees and a lawyer for the Fair had implied or apparent authority to enter into an oral contract for the operation of the hamburger and frankfurter concession. The District Court ruled that there was no evidence of implied, apparent or actual authority on the part of these three persons to waive the requirements that the contract be in writing, executed by a duly authorized officer of the Fair or to enter into an oral agreement. This ruling on the facts was affirmed by the Circuit Court of Appeals.

III.

The Action Below.

The action below was commenced in the Supreme Court, New York County, by Franham Distributors, Inc. (hereinafter called "petitioner" or "plaintiff") and was removed to the United States District Court for the Southern District of New York upon a complaint setting forth two separate and distinct actions: The first was to recover $1,000,000 as damages from the New York World's Fair 1939 Incorporated (hereinafter called the "Fair") for breach of an alleged oral contract to award to plaintiff the hamburger and frankfurter concession at the Fair during the 1939 season; and the second was to recover $1,000,000 from Swift and Company for allegedly tortiously inducing the Fair to breach such contract. The Fair denied that any contract had been made. Swift and Company denied that it had induced a breach of the alleged contract. There is no charge of conspiracy between the Fair and Swift and Company.

The action was tried to a jury. At the close of the plaintiff's evidence, the Court granted a motion to dismiss

the complaint as to the Fair and Swift and Company for plaintiff's failure to prove a *prima facie* case. Judgment was entered in the lower court on October 31, 1940, in favor of the defendants Fair and Swift and Company, which judgment was affirmed by the Circuit Court of Appeals for the Second Circuit, the judgment of that court being entered on February 6, 1942. Application by petitioner for a re-hearing was denied by the Circuit Court of Appeals on January 8, 1942.

IV.

Corrected Statement of the Case.

The petitioner has referred at great length to the alleged facts in the case, the "facts" mostly being assertions made by plaintiff's counsel in his opening to the jury. Because of the impression that may be left by such references, we deem it necessary to set forth the facts as they actually were.

As stated by the Court in *Kennedy & Co.* vs. *New York World's Fair 1939 Incorporated* (2nd Dept., 1940), 260 App. Div. 386 at 389, affirmed without opinion, N. Y., , the Fair "* * * is of such a nature that it is a 'public purpose.' The Fair has the sponsorship, in different degrees, of the city, State and Federal governments. It includes exhibits of art, science, business, states and nations, and educational and recreational facilities. The defendant Fair Corporation is a non-profit membership corporation; and the enabling legislation (Laws of 1936, chap. 544) and a subsequent enactment (Laws of 1939, chap. 471) provide that after payment of expenses, any surplus resulting is to be turned over to the city and the State for public purposes."

The Fair being a huge public enterprise dedicated to a "public purpose," the operation of which entailed the employment of thousands of persons and the making of numerous contracts, concession and exhibit agreements involving millions of dollars, it was necessary, in order to

avoid any suggestion of corruption, favoritism or mistake, that a system should be adopted which would make certain that, before the Fair obligated itself under a contract, the proposed contract would first have been considered and approved by the proper authorities.

Accordingly, the Board of Directors of the Fair Corporation established an orderly procedure for the acceptance of contracts for concession agreements. One of the requirements was that before any concession agreement could be entered into, it first must be approved by the Executive Committee (fols. 262-263).

As a great number of people were seeking concessions to operate various ventures which were to be located at the Fair, a method was also devised to enable the Fair to eliminate as prospective applicants for a concession such persons as, from a preliminary investigation, obviously appeared to be unqualified to operate the same (fols. 243-244).

In order to obtain information upon which to make such a preliminary determination, the Fair gave to each applicant a so-called "Information Return from Applicants for Concessions" hereinafter called "Information Return" (Pltf.'s Ex. 2, pp. 156-160, incl.), which the recipient thereafter filled out as indicated and returned to the Fair. Thereafter an investigation was made to ascertain in a preliminary way the truth of the assertions made therein. The "Information Returns" together with the report of the preliminary investigation were then sent to a group at the Fair known as the "Concessions Pre-Qualifications Board" for their consideration. If after consideration the Board found an applicant pre-qualified to bid for a concession and its findings were approved by Grover Whalen, President of the Fair (Pltf.'s Ex. 3, p. 161), the applicant for the purpose of making its bid was sent a booklet (hereinafter called "Proposal to Bid") which previously had been prepared by the Fair (Pltf.'s Ex. 5, pp. 168-215). This procedure was followed only where the Fair previously had determined that it would call for public bids on a particular concession. The Fair

was under no compulsion to call for bids and could privately award a concession if it so desired.

After the applicants had made up their bids, the Proposals to Bid were returned to the Fair Corporation as sealed bids and thereafter at a time stated therein, they were publicly opened and read (Pltf.'s Ex. 5, fols. 511-512, 519), the bidders were interviewed, and a report made to the Executive Committee. Subsequently, if the Executive Committee decided to accept any of the bids, a notice in writing signed by a duly authorized representative of the Fair, as provided by the "Proposal to Bid," would be sent to the successful bidder. Thereafter the rights and obligations provided for in the Concession Agreement were to become effective and binding on the parties upon its formal execution by the Fair (Pltf.'s Ex. 5, Par. No. 7; fol. 525). The Fair reserved the right to reject any and all bids for any reason whatsoever (Pltf.'s Ex. 5, fols. 513, 519, 522, 545-546, 556). Accordingly, it was not bound to let the bid to the highest bidder.

In the latter part of 1936, the Fair had determined that one of the projects at the Fair grounds for which bids were to be asked would be a concession for 70 stands for the sale of hamburgers, frankfurters, coffee, tea and milk, to be operated as one concession, and a large number of persons thereafter applied for the concession (fol. 241; Pltf.'s Ex. 3, pp. 161-166).

In line with the Fair's policy, each person, including plaintiff, who made inquiries with reference to the hamburger and frankfurter concession, was given an "Information Return" (fols. 243-245; Pltf.'s Ex. 2, pp. 156-160). This "Information Return" in no way committed the Fair, it being expressly stated thereon that "The Information herein furnished to New York World's Fair 1939 Incorporated is solely for its use in the classification and consideration of Applicants for Concessions and shall in no way be binding upon the Fair Corporation" (Pltf.'s Ex. 2, p. 156).

As will appear from Plaintiff's Exhibit 3 (pp. 161-166), one hundred and three persons, including plaintiff, filed

"Information Returns" with the Fair for the hamburger and frankfurter concession, of which number eighty-six for various reasons were not recommended to be pre-qualified to bid (Pltf.'s Ex. 3, pp. 164-166). The balance or seventeen were regarded as pre-qualified (Pltf.'s Ex. 3, pp. 161-163) and "Proposals to Bid" which had previously been prepared by the Fair were sent to them. Among these was the plaintiff.

Of these seventeen, only five submitted bids. These included the plaintiff [whose sealed bid contained in its "Proposal to Bid" (Pltf.'s Ex. 5; fols. 546-563) was filed with the Fair on the morning of February 1, 1938 (fols. 197-198, 248)] and York Food Company, a subsidiary of defendant Swift and Company. With the exception of plaintiff, all of the other five bidders were experienced restaurant people, Swift and Company, although a food packing company, having operated the hamburger and frankfurter concession at the Chicago World's Fair (fols. 230, 249, 276; Pltf.'s Ex. 8, p. 220).

As stated above, the bids were sealed, and pursuant to their terms, were to be publicly opened and read at the office of the Fair in the Empire State Building on February 1, 1938 at 12 noon (Pltf.'s Ex. 5 at fol. 511).

At noon on that day, Mr. James S. Hemingway, attorney and member of the firm of Lord, Day & Lord, counsel for the Fair, Mr. Maurice Mermey, the Fair's Acting Director of Concessions and Exhibits, and Commander Howard A. Flanigan, who was then Administrative Assistant to the President, being present, the bids were opened and read by the Secretary of the Fair to those who were present, including plaintiff's representatives (fols. 198, 247, 248, 330-331). After the opening and reading of the bids, it was obvious that the plaintiff was the highest bidder. In fact, an examination of Plaintiff's Exhibit 8 (p. 220) shows that, both in percentages and in the amount of bonds which plaintiff agreed to take, plaintiff's bid was considerably higher than that of the next highest bidder.

On the same day, *i. e.*, February 1, shortly after the bids were opened and read, and when it was apparent that

the plaintiff was the highest bidder, Commander Flanigan instructed Mr. Hemingway to get the plaintiff's representatives in for the purpose of discussing its bid. Up to this time, no one connected with the Fair had ever met anyone connected with the plaintiff (fol. 331). Accordingly, a meeting was desired in order that the Fair might inquire further into plaintiff's qualifications and ascertain whether or not it was capable of operating this important concession (fol. 252). Mr. Hemingway attempted to get in touch with Mr. Trulis, listed on the Information Return as the President of the plaintiff corporation. He was unable to locate Trulis at the address given on the Information Return and was told, in fact, when he telephoned to the house, that no such person was known there. He reported this to Commander Flanigan and was then instructed to get in touch with Mr. Louis Golde who was listed on the Information Return as the Treasurer of the plaintiff corporation. Mr. Hemingway called Mr. Golde at his office but Golde was not in. He left word for Golde to call him (fols. 249-252). Mr. Hemingway did not call or speak to Max Natanson on February 1, as claimed by plaintiff, nor did he speak to Mr. Golde on that day, nor did he have any conversation with anyone connected with the plaintiff corporation on that day (fols. 252-253). On the morning of February 2, Golde returned Hemingway's call, at which time the only conversation had was to the effect that the Fair wished to see the plaintiff's representatives for the purpose of discussing the bid. An appointment was then made for 3 o'clock that afternoon at the offices of the Fair in the Empire State Building. At the appointed time, Mr. Louis Golde appeared at the offices of the Fair, accompanied by Max Natanson and a Mr. Julius Zeiser, an attorney (fols. 253-255). When Golde, Natanson and Zeiser arrived, there were already present Hemingway, Mermey and Commander Flanigan (fols. 255-256). At no time did Hemingway, Mermey or Flanigan congratulate the plaintiff's representatives on the plaintiff being the highest bidder; nor did they tell them that plaintiff's bid had been accepted or that the contract was theirs, or in

any other way indicate that plaintiff's bid had been accepted (fols. 256-261). All of these men were well aware of the fact that before any concession could be awarded the Fair's Executive Committee would first have to approve it (fols. 262-263). After introductions were made (none of the parties ever having met before; fols. 250, 256, 331, 333), the conversation was opened by Mr. Golde who stated that Franham wanted a reduction in the amount of the Fair bonds it had obligated itself to purchase. He stated that although they had agreed to purchase $600,000 of the bonds, the next highest bidder had agreed to purchase only $150,000 of the same, and that when the persons plaintiff had interested in purchasing the $600,000 of bonds saw that the other bids which had been made by experienced restaurant people were so much lower, they refused to go through with the purchase of the bonds. Commander Flanigan replied that he did not believe that the Executive Committee would consent to a reduction in the amount of the bonds as the Fair was trying to sell as many bonds as possible, but that he would take it up with them (fols. 256-257).

Commander Flanigan then inquired of Mr. Golde who Tom D. Trulis was. Flanigan asked the question because, while plaintiff's Information Return indicated that Trulis, who signed it as its President, was the one person connected with the plaintiff organization who had the necessary experience in the operation of similar concessions, reports had come to the Fair which led it to believe that the information concerning Trulis's experience was false. The Fair, previous to February 2, had been informed that Trulis's only experience had been in the operation of restaurants at race tracks for the employees of those tracks, *i. e.*, jockeys, swipes, etc., and that he had never operated restaurants or concessions for the general public (fol. 257). Mr. Golde replied that they were not tied up with Trulis in any way; that he was no longer President of or interested in the corporation; that he was out of the picture and that he had been named as President in the Information Return for the reason that he was the only one they knew who had had any experience in the restaurant busi-

ness (fols. 257-258). The plaintiff's bid as distinguished from the Information Return was signed by Louis Golde as President, and not by Trulis who at the time of the filing of the bid was no longer President of the Company (fol. 202) (Pltf.'s Ex. 5, at p. 187). Commander Flanigan then asked Mr. Golde whether or not they had made any commitments for the purchase of their hamburgers and frankfurters, and upon Mr. Golde's answering in the negative, Flanigan stated that Swift and Company was to be an exhibitor at the Fair, that it was the policy of the Fair to assist its exhibitors if possible and that if plaintiff had made no commitments to any other food purveyors, he would like its representatives to speak to a representative of Swift and Company to see if an arrangement could be worked out whereby Swift and Company would supply the hamburgers and frankfurters if plaintiff obtained the concession. Mr. Golde stated that he would be pleased to do so and thereafter an appointment was made for Mr. Golde to see Mr. Morris, a representative of Swift and Company, the following day. With that the conference broke up and the plaintiff's representatives left (fols. 258-261).

Previous to the conference, Mr. Hemingway had prepared a draft of the proposed contract for the purpose of going over the terms of the same with plaintiff's representatives. As the plaintiff's representatives were leaving, Mr. Zeiser, who was the attorney for plaintiff, asked Mr. Hemingway to let him have the proposed contract as he wanted to study it (fol. 263). (It is to be remembered that the proposed concession contract if executed by the Fair committed the plaintiff to an immediate expenditure of over three-quarters of a million dollars, while the Fair was not to open until some time in May 1939.) Mr. Hemingway complied with the request. The plaintiff's representatives then left and Commander Flanigan met Mr. Morris of Swift and Company and told him what had transpired and asked him to see the plaintiff's people, to which Mr. Morris reluctantly agreed, stating that Swift and Company was interested in the concession itself and it did not want to go in with anyone else (fols. 264-265). Thereafter,

on the same day, Commander Flanigan, in the presence of Mr. Hemingway and Mr. Mermey, prepared a report of their conferences with the plaintiff's representatives and with Morris and sent it to Mr. Grover Whalen, the President of the Fair (fols. 265-266). Whalen in turn took it up at a meeting of the Executive Committee of the Fair held that evening at 5 o'clock (fol. 266). This meeting was not an extraordinary or unusual one, as intimated by plaintiff's counsel. It was held for the reason that on that day, and immediately preceding it, the Board of Directors of the Fair Corporation had held its annual meeting, at which meeting the Executive Committee for the succeeding year had been appointed (fol. 266).

The Executive Committee, having before it Flanigan's report made about an hour previously, rejected all bids, including the plaintiff's bid (fol. 270).

The hamburger and frankfurter concession was a very important one (fol. 180) and the character and background of the persons or corporations securing it were of the utmost concern to the Fair for two reasons: (1) It was realized that the sale of hamburgers and frankfurters, unless they were of the very best quality, carried with it grave danger of food poisoning to the patrons of the Fair, with the resulting injury to the patrons and damage to the reputation of the Fair; and (2) the Fair expected to derive large profit from this concession. For both of these reasons, the Executive Committee wished to be sure that it was dealing with responsible and experienced people upon whom it could rely. On the basis of Flanigan's report, the Executive Committee felt that plaintiff would not be a proper party to operate the concession (fols. 241, 266-268).

As the other bids had been low with respect to the amount of bonds to be purchased (see Pltf.'s Ex. 8, fols. 658-660), the Executive Committee decided to take new bids in which the percentages would be fixed at the minimum set forth in the original Proposal to Bid (Pltf.'s Ex. 5, at fols. 542, 543), thus only permitting competitive bidding on the amount of Fair debentures to be purchased (fol. 270).

On the next day, February 3, a telegram was sent to plaintiff and the other bidders informing them that all bids had been rejected (fol. 216).

Subsequently, Childs and Company was awarded the concession after obligating itself to purchase $600,000 of the Fair's debentures (fol. 270).

The damage claimed by plaintiff for the Fair's breach of its alleged oral contract is the loss of $1,000,000 in profits which it asserts it would have earned if it had been allowed to operate the concession during the 1939 season of the Fair (fols. 20, 237).

ARGUMENT

POINT I

The trial judge properly excluded the testimony of plaintiff's witnesses respecting alleged conversations with Messrs. Hemingway, Mermey and Flanigan.

The trial court refused to permit the plaintiff's witnesses to testify to conversations had with Mermey, Hemingway and Flanigan for the reason that no evidence had been offered showing that these three gentlemen were expressly or impliedly authorized to bind the Fair (Opinion of the trial court at fol. 460).

It is, of course, an elementary principle of law that declarations of an alleged agent are not competent evidence unless it is first proved that he was the agent of the party sought to be bound and that the declarations or admissions were made in respect to matters within the scope of his agency.

First Unitarian Soc. of Chic. vs. *Faulkner* (1875), 91 U. S. 415;

Stringham vs. *St. Nicholas Ins. Co.* (1867), 42 N. Y. (3 Keyes) 280;

Edwards vs. *Dooley* (1890), 120 N. Y. 540;

Bell vs. *Harrison* (1876), 66 N. Y. 627;

Marvin vs. *Wilbur* (1873), 52 N. Y. 270.

And whether or not there is any competent evidence reasonably tending to prove the existence of an agency is for the Court to determine and if there is none or if it is so slight that a finding thereon would not be sustained, the question should be disposed of by the Court and not submitted to the jury.

Hedeman vs. *Fairbanks-Morse Co.* (1941), 286 N. Y. 240 at 248;

Franklin Bank Note Co. vs. *Mackey* (1895), 83 Hun 511; aff'd 155 N. Y. 685. Motion for reargument granted 157 N. Y. 674, reversed on other grounds 158 N. Y. 140;

Hunter vs. *Royal Ins. Co.* (1924), 209 App. Div. 15;

Mechem on Agency (2d Ed.), Secs. 293, 295.

Petitioner concedes in its brief (bottom p. 31) that these three men had no express authority to orally or otherwise accept plaintiff's bid or to enter into a contract with it on the Fair's behalf, but it contends that they were held out by the Fair as being apparently authorized to do so. An examination of the record discloses that there is not the slightest evidence to support such a contention.

The testimony offered by plaintiff in its attempt to prove the apparent authority of these three gentlemen consists for the most part of concessions respecting Messrs. Hemingway, Mermey and Flanigan made by the Fair's counsel at the trial.

The facts conceded as to James S. Hemingway were as follows:

In December of 1937 and January and February of 1938, Mr. Hemingway was a member of the law firm of Lord, Day & Lord; that as a member of that firm, he was in the legal department at the Fair, doing the legal work

of the Fair, and that among his duties was the drafting of all the contracts in the Concessions Department and the rendering of other legal services (fols. 337-338). The fact that Mr. Hemingway as attorney for the Fair had prepared a draft of the proposed Concession Agreement prior to the conference of February 2, and Mr. Whalen, on his examination before trial, in response to a question by plaintiff's counsel as to when he first learned that Mr. Hemingway had prepared the proposed Concession Agreement (Pltf.'s Ex. 10 for identification, pp. 222 *et seq.* of the record), answered "*I don't know as I had any definite knowledge that this specific concession agreement was drawn* except that it was in line with Mr. Hemingway's responsibility to draw this immediately after bids were received and accepted by the Corporation" (fol. 425), in no way indicates that Mr. Hemingway had any authority, expressed, apparent or implied, to bind the Fair.

Indeed, at the trial, plaintiff's counsel during a colloquy with the Court, conceded Mr. Hemingway had no authority to bind the Fair when he stated:

> "Mr. Pfeiffer: Now I don't submit that at this time, and perhaps you haven't got my trend of thought. *We are not contending that this telephone call from Hemingway or this conversation between Hemingway and Golde made the contract,* • • •." (fol. 339) (Italics ours unless otherwise noted)

The facts conceded as to Maurice Mermey were as follows:

He was a member of the Pre-Qualifications Board, was Acting Director of Exhibits and Concessions from December 31, 1937 to May 1938, and among his duties was the planning and developing of the various types of concessions to be had, and to sell all the exhibit space to be sold, that is, all of the domestic exhibit space, exclusive of government contracts (fols. 342-343).

It was never conceded or proved that he had the power to negotiate contracts in the sense that he had authority to accept and execute contracts on the Fair's behalf for

concessions and exhibits as set forth in petitioner's brief (pp. 37-38). Defendant Fair's counsel expressly refused to so concede; whereupon plaintiff's counsel stated that he had Mr. Mermey [who at the time of his examination before trial by plaintiff and at the time of trial was not employed by the Fair (fol. 360)] under subpoena, and asked that the trial go over another day so that he could call Mr. Mermey to testify that he had such power (fols. 342-346, 413). The trial judge granted the adjournment (fols. 433-435), but on the following day Mr. Pfeiffer failed to call Mr. Mermey and stated that he had no further proof as to authority other than the concessions which previously had been read into the record (fols. 437, 447).

The facts conceded as to Commander Howard A. Flanigan were as follows:

He was Administrative Assistant to the President on February 2, 1938 and was not then the Executive Vice-President of the Fair, as stated in the head note of Point I of petitioner's brief, although he subsequently became such, his duties thereafter remaining substantially the same as before (fols. 365-366). His duties with respect to this particular concession were that he had both his general supervisory charge of it, and also, as Chairman of the Concessions Pre-Qualifications Board, he had a *more* (not "most," as stated in petitioner's brief, page 38) intimate and executive direction of it (fol. 368). Flanigan's affidavit used on the Fair's motion for summary judgment (Pltf.'s Ex. 9 for Identification, p. 221), which was excluded by the Court, merely states that he was Administrative Assistant to the President of the Fair, and in that capacity he was responsible for the taking and considering of bids for the concession involved in this action. Nowhere does it state that he had any authority to accept bids or execute contracts on behalf of the Fair Corporation.

None of these men at the time in question was an officer of the Fair and only Mermey and Flanigan were employed by it.

No evidence was offered or could have been offered by plaintiff (fol. 447) that any of plaintiff's representatives

knew, prior to the commencement of this action, in what way Flanigan, Mermey and Hemingway were connected with the Fair or what their duties were, or that they knew what, if any, authority these three men had. There is no evidence that any of these men at any time were authorized to or did waive any written provisions in the Proposal to Bid or that they were authorized to or did accept bids or execute contracts on behalf of the Fair. There is no evidence that they were ever held out by the Fair as having such authority, or that they were permitted without objection to assume such authority, or that there was any custom or conduct on the part of the Fair which would estop it from claiming any lack of authority on the part of any of these men. There is, of course, no evidence that the Fair knew of or acquiesced in any of the alleged acts done by these men or that it ratified the same. On the contrary, it is clear from the record that the Fair rejected all bids, including the bid of plaintiff, within a few hours after the alleged oral acceptance.

Furthermore, plaintiff knew on and long prior to February 2 that acceptance of a bid could be made only by a duly authorized representative of the Fair and in writing. The "Proposal to Bid," which plaintiff's representatives had studied thoroughly (fol. 186), contained the following:

> "7. Acceptance of Proposals and Its Effect. Within thirty (30) days after the opening of the Proposals the Corporation will act upon them. The acceptance of a Proposal will be a *notice in writing signed by a duly authorized* representative of the Corporation, and no other act of the Corporation shall constitute the acceptance of a Proposal. The acceptance of a Proposal shall bind the successful Bidder to execute the Concession Agreement and to be responsible for liquidated damages as provided in Paragraph 8. The rights and obligations provided for in the Concession Agreement shall become effective and binding upon the parties upon its *formal execution* by the Corporation." (Pltf.'s Ex. 5, fols. 525-526.)

The specimen contract annexed to the Proposal to Bid (Pltf.'s Ex. 5, at pp. 213-214) and the draft contract prepared by Hemingway (Pltf.'s Ex. 10 for Identification) also clearly indicate that the Concession Agreement was to be executed on behalf of the Fair by Grover Whalen, its President. Such notice made it obligatory on the plaintiff to ascertain for itself the authority of Messrs. Hemingway, Mermey and Flanigan before it relied on anything said by them.

As stated by the Court in *Ernst Iron Works* vs. *Duralith Corp.* (1936), 270 N. Y. 165, at page 170:

> "* * * There can be no reliance on apparent authority unless the circumstances are such that the plaintiff is entitled to rely upon it. (See *Deyo* v. *Hudson*, 225 N. Y. 602, 612-614.) 'If a third person has notice of a limitation of an agent's authority, he cannot subject the principal to liability upon a transaction with the agent in violation of such limitation.' (Restatement of the Law of Agency, § 166, Cf. Id. § 167. See Tiffany on Agency (2d. Ed.) § 19; 75 A. L. R. at p. 1047.)"

See also:

Stringham vs. *St. Nicholas Insurance Co., supra;*

Walsh vs. *Hartford Fire Ins. Co.* (1878), 73 N. Y. 5;

Cullinan vs. *Bowker* (1904), 180 N. Y. 93;

Angerosa vs. *White Co.* (4th Dept., 1936), 248 App. Div. 425, aff'd 275 N. Y. 524.

At the time plaintiff made its bid, its representatives knew that the Fair was a huge public venture which involved the making of many hundreds of contracts for concessions. In view of this and the requirements relative to the acceptance of the bid and the execution of the concession contract contained in its Proposal to Bid, plaintiff now cannot claim that its representatives, who were experienced business men (fols. 303-308), believed or had a right to believe that a contract concerning this important

concession would have been accepted by the Fair in such an off-hand manner, or that Hemingway, Mermey and Flanigan would have authority to do so. As stated in *Union Car Advertising Co.* vs. *Collier* (1934), 263 N. Y. 386 at page 390:

> "We cannot imagine a man of Mr. Wineburgh's experience in the advertising business relying upon the representations of a general manager contrary to the express terms of the contract he was about to sign. He must have known that Dana had no power or authority to vary the written contract."

See also:

> Mechem on Agency (2d Ed.), Sec. 726, where it is stated:
>
> "* * * in any case, the reliance must have been a reasonable one, consistent with the exercise of reasonable prudence, and the party who claims reliance must not have closed his eyes to warning or inconsistent circumstances. Authority is not 'apparent' simply because the party claiming has acted upon his conclusions. It is not 'apparent,' in contemplation of law, simply because it looked so to him. It is not a situation where one may read while he runs. It is only where a person of ordinary prudence, conversant with business usages and the nature of the particular business, acting in good faith, and giving heed not only to opposing inferences but also to all restrictions which are brought to his notice, would reasonably rely, that a case is presented within the operation of the rule. If the inferences against the existence of the authority are just as reasonable as those in favor of it, there can be no reliance within this rule."

To the same effect see:

> *Quinlan* vs. *Providence Washington Ins. Co.* (1892), 133 N. Y. 356.

Moreover, plaintiff suffered no injury by reason of the unauthorized acceptance of its bid (assuming for argu-

ment's sake that it was accepted by these three men) as it did nothing nor did it refrain from doing anything in reliance thereon. The only damage that plaintiff claims is loss of profits it might have made if it had been allowed to operate the concession (fols. 20, 237). But this alleged loss was not due to any reliance by plaintiff's representatives on anything said or done by Hemingway, Mermey or Flanigan, but was the result of the Executive Committee's rejection of all bids. Accordingly, it cannot rely upon the doctrine of apparent authority to charge the Fair with liability for the alleged unauthorized acts of those three men for "Whether apparent authority is based upon the principle of estoppel or not, it 'implies a transaction itself invalid, and a person who is forbidden for equitable reasons to set up that invalidity.'" *Wen Kroy R. Co.* vs. *Public Nat. Bank and T. Co.* (1932), 260 N. Y. 84 at page 92.

See also *Walsh* vs. *Hartford Fire Ins. Co., supra,* where the Court said at page 10:

> "* * * The principal is often bound by the act of his agent in excess or abuse of his actual authority, but this is only true between the principal and third persons, who believing and having a right to believe that the agent was acting within and not exceeding his authority, *would sustain loss if the act was not considered that of the principal.* (*Clark* v. *Metropolitan Bank,* 3 Duer, 248; Story on Agency, Sec. 127; *Howard* v. *Braithwaite,* 1 Ves. & B., 209; *Stainer* v. *Tysen,* 3 Hill, 279; *Barnard* v. *Wheeler,* 24 Me., 279.) * * *."

To the same effect, see:

Bickford vs. *Menier* (1887), 107 N. Y. 490;

Perry vs. *New York Life* (Spec. T., N. Y. Co., 1940), 22 N. Y. S. 2d, 696.

For the reasons stated above, we submit that as a matter of law no competent evidence was offered reasonably tending to prove that the Fair was in any way bound by anything said or done by Hemingway, Mermey or Flanigan. Accordingly, the Court properly excluded all conversations with them.

POINT II

The acceptance of plaintiff's bid would not have obligated the Fair to award the concession to it.

Assuming for argument's sake that plaintiff's bid had been accepted by the Fair, such acceptance would not have obligated the Fair to award the plaintiff the concession as the Proposal to Bid (Pltf.'s Ex. 5 at fol. 525) provides:

> "7. **Acceptance of Proposals and its Effect.** • • • The acceptance of the Proposal shall bind the successful Bidder to execute the Concession Agreement and to be responsible for liquidated damages as provided in paragraph 8. The rights and obligations provided for in the Concession Agreement *shall become effective and binding upon the parties upon its formal execution by the Corporation.*"

Clearly, the effect of such a clause is to make the execution of a written contract by the parties a condition precedent to the existence of a contractual relationship, and where the parties make the reduction of the agreement to writing and its signature by them a condition precedent to its completion, it will not be a contract until that is done, and this is true although the terms of the contract have been agreed upon. See *McCormick* vs. *Oklahoma City,* C. C. A. 8th (1913), 203 Fed. 921; appeal dismissed 236 U. S. 657. There the City of Oklahoma advertised for bids and the plaintiff was the lowest bidder. The specifications for the bid, the advertisements therefor, and the contracts for successful bidders provided expressly that a written contract was to be entered into. The City Council of Oklahoma City, which, according to the terms of the invitation to bid and the proposed contracts, had to approve and confirm the bids, accepted in part the bid of the plaintiff. The City thereafter refused to perform and the plaintiff sued for breach of contract. It was held that the plaintiff did not have a cause of action against the City for the reason that it was clearly contemplated by

the parties that the City was not to be bound by an acceptance of the bid but only by the execution of a formal written contract.

It is stated at page 927 of the opinion:

> "* * * We shall therefore assume that where parties have fully agreed upon a contract, but have simply decided to reduce it to writing as evidence, the contract may be enforced, especially where it has been executed in whole or in part by the party seeking its enforcement, with the knowledge and acquiescence of the other party, notwithstanding the failure to reduce it to writing. But if the parties have stipulated in effect that the contract shall only be in force from the time it is reduced to writing and executed, there is no completed contract until it is put in writing as agreed."

To the same effect, see:

General Motors Corp. vs. *Abell,* C. C. A. 1st (1923), 292 Fed. 922; cert. den., 264 U. S. 583;

Ambler vs. *Whipple* (1874), 87 U. S. (20 Wall.) 546;

Evans vs. *Marr,* C. C. A. 5th (1924), 298 Fed. 288; cert. den., 265 U. S. 585;

Best & Company vs. *Federal Terra Cotta Co.* (1st Dept., 1928), 224 App. Div. (N. Y.) 618 at page 619.

Commercial Telegram Co. vs. *Smith,* 1st Dept. (1888), 47 Hun 494.

Furthermore, no claim is made and none could be made by petitioner that the Fair's representatives by word or act waived the provision contained in the bid that after acceptance of the bid the contract was only to "*become effective and binding upon the parties upon its formal execution by the Corporation.*" Indeed, from plaintiff's opening to the jury, it appears that plaintiff's representatives were well aware that the contract was not to be in force until it was reduced to writing and formally executed by the parties as

plaintiff's counsel stated (fol. 215) that plaintiff's representatives at the conference of February 2 asked Commander Flanigan when they should return to sign the contract and were told by him to return the next day.

POINT III

Answering Point I of Petitioner's Brief and Sub-Headings A to D, inclusive, thereof.

We wish to point out again that on February 1 and 2, 1938, Flanigan was not, as repeatedly stated throughout petitioner's brief, the Executive Vice-President of the Fair. At that time he was the Administrative Assistant to the President. Nor is there any evidence that Flanigan and Mermey were, as asserted by plaintiff, at that time officers of the Fair; they were merely employees. Hemingway, of course, was not an officer or employee of the Fair at any time.

For the reasons stated in Point I of our brief, the authorities cited by petitioner in its brief at page 25 and the first half of page 26 have no application to this case.

Answering Sub-Heading A of Point I of Petitioner's Brief:

The assertion made by petitioner that the alleged conversations [which conversations, as admitted by plaintiff's counsel at the trial (fol. 452), were the only proof he had to offer on the making of the alleged contract] had by plaintiff's representatives with Hemingway, Mermey and Flanigan are admissible as part of the *res gestae* without proof as to these three men's authority to bind the Fair is not a correct statement of the law of agency and is not sustained by the authorities cited by the petitioner. On the contrary, *Stecher Lithographing Co.* vs. *Inman* (1903), 175 N. Y. 124 cited at page 26 of petitioner's brief, holds that the acts and declarations of an alleged agent become part of the *res gestae* only when it is first shown that such alleged agent was a duly authorized agent of the person sought to be charged thereby and that they were

uttered by the agent while he was acting within the scope of his authority. That Dean Wigmore is in accord with this view of the law is evidenced from the very first sentence in the quotation from his work set forth at page 26 of petitioner's brief. It reads as follows:

> "It may be noted that *the fact of agency must of course be somehow evidenced before the alleged agent's declarations can be received as admissions;* and therefore the use of the alleged agent's hearsay assertions that he is an agent would for that purpose be inadmissible as merely begging the question." 4 Wigmore, Sec. 1078.

It is well settled law that the facts of agency or the extent of an agent's powers may not be established by the representations of the agent as a principal is responsible only for that appearance of authority which is caused by himself and not for that appearance of conformity to the authority which is caused only by the agent.

See:

Dudley vs. *Perkins* (1928), 248 N. Y. 250;

Mullen vs. *Quinlan & Co.* (1909), 195 N. Y. 109;

Bussing vs. *Lowell Film Publications, Inc.,* 3rd Dept. (1931), 233 App. Div. 493; aff'd 259 N. Y. 593;

Herschcovitz vs. *Kleinman,* 1st Dept. (1929), 227 App. Div. 62.

It is evident from Point I of our brief that, as a matter of law, plaintiff offered no competent evidence reasonably tending to prove that Mermey, Hemingway and Flanigan had any authority to bind the Fair. This being so, there was no question of agency to go to the jury. (See authorities cited at pp. 11-12 of our brief.)

The cases cited in petitioner's brief in support of its contention that the question should have been left to the jury all hold that it is for the court to determine first whether there is any competent evidence reasonably tending to prove the existence of an agency and, if there is

not, the question must be disposed of by the Court. The citation from Dean Wigmore at page 28 of its brief clearly indicates that before the utterance of an alleged agent may be received "* * * it must have been made in and about the business on which the agent was employed and while actually engaged in that business, * * *."

Answering Sub-Heading B of Point I of Petitioner's Brief:

Established practice does not justify, as contended by petitioner, the admission of proof of the alleged oral agreement first and a consideration of the question of authority at a later stage of the trial. "The order in which evidence may be introduced in a case is within the sound discretion of the trial judge." *Vaughan* vs. *Texas Branches,* C. C. A., 5th Cir. (1940), 112 Fed. (2d), 536 at page 537. And this view is sustained by the authorities cited by petitioner at pages 28 and 29 of its brief.

Moreover, while it may be true, as stated in *First Unitarian Soc. of Chi.* vs. *Faulkner, et al.* (1875), 91 U. S. 415, cited at pages 33 and 34 of petitioner's brief, that in special cases "* * * it is competent for the presiding judge *if in his judgment* the ends of justice require it to relax the rules of practice, and to admit the evidence offered before the proper foundation for the admissibility of the same is laid, *if he is well assured by the party offering the evidence that the agency in question will be subsequently proved,*" petitioner entirely overlooks the point that it had no further evidence to offer concerning the alleged authority of these three men. Plaintiff's counsel on the last day of the trial stated to the Court:

> "Mr. Pfeiffer: Now there isn't any point, in my judgment, in my view of the state of the record at the present time, to put up any further evidence in connection with the authority of the officials of the Fair in view of the concessions that were made yesterday. We have those concessions in the record. I have read those concessions, your Honor, *and I do not think that we can add anything to the concessions already made in this record.*" (fol. 447)

The plaintiff had examined at length prior to the trial, as permitted by the Federal Rules of Civil Practice, not only Hemingway, Mermey and Flanigan, but also Grover Whalen, the President of the Fair, and Harvey Gibson, Chairman of the Board of the Fair (fols. 199, 218). But at the trial it was unable to offer any evidence on the question of their authority other than that which appears in the record, although, as appears from the record, it was given ample opportunity by the trial judge to do so.

It therefore would have been a waste of the Court's and litigants' time for the trial judge to permit plaintiff to proceed with what would have been a protracted trial (fol. 175) when it was obvious that no competent evidence could be offered to prove the authority of these men to bind the Fair.

Answering Sub-Heading C of Point I of Petitioner's Brief:

There is nothing inconsistent between the trial judge's rulings and Judge Bondy's decision (fols. 685-692) on the motion for summary judgment. Judge Bondy decided that an oral contract could still be made notwithstanding the provision in plaintiff's bid that acceptance by the Fair must be in writing, signed by a duly authorized agent of the Fair, and that the parties were to be bound only after the concession document had been formally executed by the Fair Corporation. He did not have before him and did not decide the question of whether Hemingway, Mermey and Flanigan had any authority to enter into a binding contract on the Fair's behalf.

The trial judge who accepted Judge Bondy's decision as the law of the case (fol. 428; Opinion fol. 458) refused to permit plaintiff's witness to testify to conversations had with Mermey, Hemingway and Flanigan for the reason that no evidence had been introduced showing that these three men were authorized to bind the Fair (fol. 444; Opinion at fol. 460). Obviously there was no inconsistency between that ruling and Judge Bondy's decision.

The statement (Opinion at fols. 460-461) by the trial judge that plaintiff itself contemplated that a written

agreement was to be entered into does not show any confusion of mind on his part. By that statement, the judge meant that it was apparent from the opening of plaintiff's counsel that the plaintiff's representatives, knowing of the provision in its proposal to bid regarding the method of accepting bids, did not believe themselves that Hemingway, Mermey and Flanigan had any authority to waive such provision or that a contract could be accepted on behalf of the Fair in any such informal manner.

It is unnecessary to comment here on the additional matter contained in sub-heading C of petitioner's brief as the arguments advanced in Point I of our brief answer the same.

Answering Sub-Heading D of Point I of Petitioner's Brief:

The burden of showing the authority of Hemingway, Mermey and Flanigan to orally accept plaintiff's bid was on the plaintiff and it was not for the Fair to show their lack of authority.

See *Schutz* vs. *Jordan* (1891), 141 U. S. 213, page 217, *et seq.*, where the Court said:

> "The ruling of the trial court was correct; the burden was on the plaintiffs, and to the extent indicated in the instructions. This is not a case in which some independent matter is set up as a defense—payment, breach of warranty, counterclaim, and the like, a defense which practically admits the plaintiffs' cause of action, and seeks to defeat it by the existence of other facts. It was not like the plea of confession and avoidance. It was a denial, it denied the sale; and the burden of proving the sale was on the plaintiffs, and rested with them until the close of the case. It would not establish a purchase by the defendants, that an agent of theirs had made a contract. The plaintiffs must go further, and prove that such agent had authority to make the contract. Not to make contracts generally; but to make the contract which in fact was made. A party who seeks to charge a principal for the contracts made by his agent must prove that agent's

authority; and it is not for the principal to disprove it. The burden is on the plaintiff. The plaintiffs would not contend that they had made out a cause of action against the defendants, by proving that Hewes had made a purchase in their name. Of course they must go further, and prove that he had authority to purchase; and they must also prove that the purchase was within the authority conferred. Authority to buy one class of goods would not be authority to buy another and entirely different class. Authority to buy in the usual course of business would not be authority to buy outside of that course of business. And when they rely upon contracts made with Hewes the burden is on them, and continues on them, to establish the contract which in fact was made, and that it was within the scope of his authority as agent. There was no error in this respect."

See also:

Ferro Concrete Construction Co. vs. *The United States*, C. C. A., 1st Cir. (1940), 112 Fed. (2d) 488; certiorari denied, 61 Sup. Ct. 136;

Owens Bottling Machine Co. vs. *Kanawha Banking & Trust Co.*, C. C. A., 4th Cir. (1919), 259 Fed. 838.

The authorities cited by petitioner at page 41 of its brief are not in conflict with the above. They hold merely that if the scope of the agent's authority be proven and it also appears that acts similar to the one sought to be proved under ordinary circumstances would be within the authority of the alleged agent, then a presumption arises that the act in question was authorized and the burden of going forward to show lack of authority is on the person asserting it.

As stated in *Martin* vs. *N. F. P. M'f'g Co.* (1890), 122 N. Y. 165, at page 174:

> *"The general rule, of course, is that the agent's authority in all cases must be shown to charge the prin-*

cipal with an act performed by the agent, but in many instances this fact may be established by presumptive evidence. And this is so where the corporation, whose obligation is in question, is engaged in a business, the nature of which and the duties in relation to which devolved upon its officers, require or justify the giving of negotiable instruments without being authorized thereto by a special vote to that effect. *If the scope of the agent's authority be proven and it appears that acts like the one in question would, under ordinary circumstances,* be within the authority, a presumption arises that the necessary circumstances did exist and that the act in question was authorized. (Morawetz on Corp., § 616; *Lincoln* v. *Iron Co.*, 103 U. S. 412; 116 N. Y. 193; *F. & M. Bk.* v. *B. & D. Bk.*, 16 id. 125; *N. R. Bk.* v. *Aymar,* 3 Hill, 262.)"

But in the instant case there is no evidence, as pointed out in Point I of our brief, that it was within the scope of Hemingway's, Mermey's or Flanigan's authority orally or otherwise to accept bids or execute contracts on behalf of the Fair, or that they had ever done so; nor is there any evidence that they were held out by the Fair as having such authority; nor does it appear from the evidence that under ordinary circumstances they would in the natural course of business of the Fair have had such authority. Accordingly, no presumption arises that their alleged acts were authorized. Hence, the Fair was not called upon to show affirmatively that they had no authority.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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